

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 25 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

MIKE V. GALLEGOS, ARMANDO V.  
GALLEGOS, CRUZ BADILLA, ANTONIA  
TREJO, LYDIA SANTA CRUZ, ESTATE  
OF LOLITA GARCIA, ESTATE OF JUAN  
GARCIA, and DELIA BARREDO,

Plaintiffs/Appellants,

v.

BARRY R. WHITE and JOANNE S. WHITE,  
husband and wife; C.H. QUILLIAM and  
ROBIN QUILLIAM, as husband and wife,  
individually, and as trustees of THE K.Q.  
RANCH TRUST dated June 16, 1997;  
HEALTH SYSTEMS ADMINISTRATIONS  
INC., a corporation of unknown origin;  
CASIMIRO V. GALLEGOS; ALTALAND  
DEVELOPMENT CORPORATION, a  
Colorado corporation; COMMONWEALTH  
MORTGAGE COMPANY, an Arizona  
corporation; K.Q. COVENANT  
INVESTMENTS L.L.C., an Arizona limited  
liability company; ESTATE OF FRANK V.  
GALLEGOS; ERLINDA GALLEGOS;  
COMMONWEALTH MORTGAGE  
PROFIT SHARING PLAN;  
RANCHO VALLE ESCONDIDO LLC,  
an Arizona limited liability company; and  
ELMA O. GALLEGOS and JANE DOE-EO  
GALLEGOS, husband and wife,

Defendants/Appellees.

2 CA-CV 2009-0088  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20055433

Honorable Paul Tang, Judge  
Honorable John E. Davis, Judge

AFFIRMED

Law Office of Michael H. Gottesman  
By Michael H. Gottesman

Tucson  
Attorney for Plaintiffs/Appellants

Laney & Jaszewski  
By Jerry L. Laney

Tucson  
Attorneys for Defendants/Appellees  
Health Systems Administrations, Inc.;  
Altaland Development Corporation;  
Commonwealth Mortgage Company;  
K.Q. Covenant Investments, LLC;  
Commonwealth Mortgage Profit Sharing Plan;  
and Rancho Valle Escondido, LLC

K E L L Y, Judge.

¶1 This appeal arises from a foreclosure action brought by plaintiffs/appellants, seven members of the Gallego family, who own 7/11ths, or approximately 63.6 percent, of a note secured by a deed of trust on a large parcel of property. They appeal from the trial court's ruling that they may foreclose only on their 63.6 percent interest in the deed of trust unless defendants/appellees, who own the remaining 4/11ths, or approximately 36.3 percent interest, consent to foreclosure of their interest. Finding no error, we affirm.

## Background

¶2 We consider the evidence in the light most favorable to upholding the trial court's ruling. *Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 228, 630 P.2d 49, 51 (App. 1981). In June 1997, eleven members of the Gallego family sold the subject property to Barry and Joanne White, who executed a promissory note secured by a deed of trust on the property, for which all eleven family members were the beneficiaries. Immediately thereafter, the Whites resold the property to defendant K.Q. Ranch Trust. Both notes contained a provision that there could be no deficiency judgment in the event the underlying deed of trust was foreclosed.

¶3 Four of the Gallego family members sold their partial interests under the promissory note and deed of trust. The purchasers and their successors (appellees) now collectively own a 4/11ths interest in the note and deed of trust, and seven Gallego family members (appellants) own a 7/11ths interest.<sup>1</sup> The Whites defaulted after they ceased making payments in November 2002.

¶4 In September 2005, appellants filed a complaint to foreclose on the entire note and deed of trust without consulting the appellees. The complaint requested that appellants' portion of the lien on the property be declared prior to any of the appellees' liens, that any proceeds from the sheriff's sale of the property be applied first to satisfy the appellants' judgment, attorney fees and associated costs, and that appellees receive whatever was left.

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<sup>1</sup>At various times throughout the proceeding, these interests have been converted to percentages, in some cases inconsistently. We note that 4/11ths is roughly equivalent to 36.3 percent and 7/11ths is roughly equivalent to 63.6 percent.

¶5 Appellees opposed the foreclosure and requested attorney fees and costs pursuant to A.R.S. § 12-341.01. After a bench trial, the court found that judgment could be taken against the Whites or their successors in interest, subject to a six-month right of redemption. However, the court found that only appellants' undivided 63.6 percent of the property could be sold at a sheriff's sale without the consent of the appellees to the sale of their interest, and that the appellees retained their secured interest in the remaining 36.3 percent of the property. It ordered that appellants' "mortgage on 63.64% of the subject property be foreclosed" and sold free and clear of all claims of the appellees, in full satisfaction of the obligations of the Whites or their successors to the appellants. The court further ordered the costs and attorney fees incurred by all parties be paid from the proceeds of the sale of the 63.64 percent portion of the land.

### **Discussion**

¶6 Preliminarily, the transcripts of the trial proceedings have not been made part of the record on appeal. Appellants are obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of the transcripts, we will presume they support the trial court's factual findings and rulings, *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005), and we address the appellants' claims accordingly.

¶7 Appellants first contend the trial court erred in ordering a sale of the property "on terms which violate A.R.S. § 33-725(A)." Section 33-725(A) states "[w]hen a mortgage or deed of trust is foreclosed, the court shall give judgment for the entire amount determined due, and shall direct the mortgaged property, or as much thereof as is necessary to satisfy the judgment, to be sold." *See also* A.R.S. § 33-807

(“At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property.”). Appellants argue the trial court should have directed the entire property be sold, because the sale of only a portion of the property will be insufficient to satisfy the judgment and will lead to inequitable results for both appellants and appellees. Appellees argue, as they did at trial, that “because of the depressed condition of the real estate market, the cost and potential liability in retaking title to the subject property, and the attractive interest rate that was accruing on the mortgage, that they should not be forced to . . . foreclose on the mortgage.”

¶8 The parties agree that “[a] suit to foreclose a mortgage is an equitable action and he who seeks equity must do equity.” *Ticktin v. W. Sav. & Loan Ass’n*, 8 Ariz. App. 63, 65, 442 P.2d 886, 888 (1968). Fashioning an equitable remedy is within the trial court’s discretion, and the court’s exercise of its discretion will not be disturbed on appeal absent an abuse thereof. *Cf. City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 55, 181 P.3d 219, 235 (App. 2008) (in zoning ordinance context, court had “discretion in fashioning a remedy” “in a proceeding in equity”). It appears the trial court decided the equitable remedy was to partition the secured interests of the parties and allow appellants to foreclose only their portion of the secured interest. In effect, the court gave them judgment for the entire amount of their partitioned interest.

¶9 Appellants argue that a sale of only a portion of the property will lead to inadequate proceeds. They have not, however, cited any evidence to support their claim that the “sale of the Appellant’s undivided 63.3% [sic] interest in the property can be expected to bring a sale price of substantially less than 63.3% [sic] of the current fair market value.” And, in the absence of a transcript, we must presume any evidence

presented at the trial on this point supported the trial court's ruling. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1. In any event, because the general rule in Arizona is that mere inadequacy of price "is not in and of itself sufficient to authorize vacation of [an execution] sale unless the inadequacy is so gross as to be proof of fraud or shock the conscience of the court," the fact that the sale may bring less than appellants are owed is not determinative here. *Homecraft Corp. v. Fimbres*, 119 Ariz. 299, 302, 580 P.2d 760, 763 (App. 1978). Section 33-725(A) states that "the court shall give judgment for the entire amount *determined* due," (emphasis added). The trial court allowed the appellants to foreclose only on what it determined to be their interest in the note and deed of trust. Again, absent the transcript, we presume the evidence presented supported that determination. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

¶10 Additionally, although appellants acknowledge "[t]here is no case law on point," they contend the appellees' interests are either equal or lesser to their interests. They further argue that because of their relative percentage of ownership of the note, and because appellees acquired their interests later in time, appellees' interests are "junior to appellants[']". We disagree. As appellees argue, their interests have equal priority with appellants'. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 267, 941 P.2d 1288, 1292 (App. 1997) ("An assignee steps into the shoes of her assignor. She 'can stand in no better position than the assignor' and '[a]n assignment cannot alter the defenses or equities of the third party.'"), *quoting Stephens v. Textron, Inc.*, 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980) (alteration in *K.B.*). On the record before us, we cannot say the trial court abused its discretion in ordering this remedy.

### Fees on Appeal

¶11 Appellees request that this court grant an award of attorney fees and costs incurred in connection with this appeal and that it be awarded from the proceeds of the sheriff's sale of appellants' 63.6 percent of the property. This court has discretion to award attorney fees to the successful party pursuant to § 12-341.01. In addition, pursuant to A.R.S. § 12-342, we award costs to the successful party on appeal. Therefore, we award costs and attorney fees from the proceeds of the sheriff's sale to appellees in an amount to be determined following their compliance with Rule 21, Ariz. R. Civ. App. P.

### **Disposition**

¶12 The judgment of the trial court is affirmed, and appellees are awarded their reasonable fees, expenses, and costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Presiding Judge